

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DYLON RAY CLARK,

Defendant-Appellant.

UNPUBLISHED

October 15, 2019

No. 346144

Chippewa Circuit Court

LC No. 16-002088-FJ

---

Before: STEPHENS, P.J., and SERVITTO and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant, Dylon Ray Clark, pleaded guilty to third-degree criminal sexual conduct (CSC-III), MCL 750.520d(1)(a) (sexual penetration of a victim between the ages of 13 and 16), and second-degree criminal sexual conduct (CSC-II), MCL 750.520c (multiple variables). Defendant was sentenced to serve concurrent terms of 10 to 15 years in prison for both convictions. Defendant appeals by delayed leave granted.<sup>1</sup> We affirm defendant’s sentences but remand for recalculation of defendant’s jail credit.

**I. FACTS**

The victims in this case are two juvenile sisters. Defendant lived with the victims’ family as a foster child beginning when he was 14 years old. Evidence in the presentence investigation report (PSIR), and reiterated by the victims in their statements at sentencing, shows that defendant forcibly sexually assaulted the two victims numerous times over a two-year period under various circumstances, sometimes involving the use of a gun, knife, screwdriver, threats regarding the other victim, or exploitation of a victim’s prescribed medications. Defendant was charged with, and bound over for trial on, numerous charges, including several counts of CSC-I predicated on variables including force or coercion, injury to the victim, victim a member of the

---

<sup>1</sup> *People v Clark*, unpublished order of the Court of Appeals, entered January 3, 2019 (Docket No. 346144).

same household, and use of a weapon. Defendant was also charged with counts of CSC-III, CSC-IV, and possession of a firearm during the commission of a felony (felony-firearm). In exchange for the dismissal of the above charges, defendant pleaded guilty to one count of CSC-II against one victim and one count of CSC-III against the other victim. Specifically, defendant admitted sexually penetrating one victim in 2014, when both she and defendant were 15 years old, and he admitted having sexual contact with the other victim in 2014, when she was 14 years old and defendant was 15 years old.

At sentencing, defendant challenged the scoring of offense variables (OVs) 1, 2, 3, 7, 8, 10, 11, 12, and 13. The trial court reduced the score for OV 11 from 50 to zero points, but it rejected defendant's remaining challenges. After the 50-point deduction, defendant's offense variable total was 175 points and his prior record variable total was 10 points, resulting in a minimum guidelines range of 57 to 95 months. The trial court departed from the guidelines range and imposed a sentence of 10 to 15 years. The trial court explained that defendant's conduct had been "incredibly shocking and remarkably disturbing," reflecting "a consistent, calculated, abuse of trust" in a systematic and intentional manner. The trial court further cited aggravating factors, including the protracted period over which the assaults occurred and the victims' fear for their own and their family members' safety in their own home. The trial court explained that its sentence was partly punitive, partly for the protection of society, partly to serve as a deterrent, and partly to afford defendant the opportunity to rehabilitate himself while in the custody of the Department of Corrections. The trial court gave defendant credit for 337 days in jail.

In a postjudgment motion, defendant argued that OVs 1, 2, 3, 7, 8, and 9 were offense-specific "*McGraw*<sup>[2]</sup> variables" that could not be scored on the basis of conduct outside the sentencing offenses, so they should have each been scored at zero points. Defendant argued that because the factual basis for his plea did not contain any specific dates or specific circumstances outside the bare elements of the offenses, it could not be determined if weapons, firearms, physical injury or abuse to a victim, or asportation were involved in the offenses for which he was convicted. Further, defendant argued that OV 12 should have been scored at zero points instead of 25 points because, since there were no specific dates given for the charges to which defendant entered his plea, it could not be determined whether any of the alleged felonious criminal acts outside the offenses for which he was convicted occurred within 24 hours of the those offenses. The trial court agreed that OV 12 should have been scored at zero points, but it otherwise rejected defendant's OV challenges; the 25-point reduction did not result in a change in the applicable guidelines range.

Defendant also argued that he was entitled under MCL 769.11b to jail credit for the time during which he was being held in a juvenile detention facility for the charges before the juvenile case against him was dismissed and he was charged in adult proceedings. The court denied the additional jail credit, noting that defendant did not seek this additional credit at the sentencing proceeding and that he was already given credit for 337 days.

---

<sup>2</sup> *People v McGraw*, 484 Mich 120; 771 NW2d 655 (2009).

## II. OFFENSE VARIABLES

Defendant argues that OVs 1, 2, 3, 7, 8, and 9 were improperly scored at higher than zero points on the basis of specific information in the PSIR concerning several other sexual assaults against each victim under different circumstances over a two-year period. Defendant contends that because it cannot be determined which of the particular incidents during the two-year period constituted the basis for each of the two offenses to which he pleaded guilty, there was no factual basis for the scoring of these variables. We disagree, and we would affirm the trial court's departure sentence in any event.

"Under the sentencing guidelines, the circuit court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence." *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). "Clear error exists when the reviewing court is left with a definite and firm conviction that a mistake was made." *People v McDade*, 301 Mich App 343, 356; 836 NW2d 266 (2013). "Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo." *Hardy*, 494 Mich at 438.

"Offense variables are properly scored by reference only to the sentencing offense except when the language of a particular offense variable statute specifically provides otherwise." *People v McGraw*, 484 Mich 120, 135; 771 NW2d 655 (2009). See also *People v Sargent*, 481 Mich 346, 351; 750 NW2d 161 (2008). In the context of a plea agreement, such "offense-specific" OVs may be scored only by reference to the particular offense to which the defendant pleads guilty, not additional conduct that did not result in a conviction. *People v Thompson*, 314 Mich App 703, 711-712; 887 NW2d 650 (2016). In *Thompson*, the defendant pleaded no contest to CSC-I for an act of penetration against his stepdaughter that occurred on February 24, 2013, "and not in regard to any of the prior sexual abuse." *Id.* at 706. During sentencing, the defendant contested the scoring of OV 7 at 50 points because the trial court "considered conduct related to past sexual abuse, instead of limiting its examination to conduct directly pertaining to the sexual assault on February 24, 2013, which was the sentencing offense." *Id.* at 707-708. This Court ruled that "under *McGraw* and *Sargent*, the trial court here was only permitted to consider conduct that occurred during the criminal offense on February 24, 2013, for purposes of scoring OV 7." *Id.* at 711.

Importantly, *Thompson* is significantly distinguishable from the instant case. In *Thompson*, the defendant pleaded no contest to a specific, identified, discrete act of sexual assault; the defendant equally specifically did not enter a plea regarding the established acts that had occurred earlier. *Thompson*, 314 Mich App at 706. As a consequence, the timeline of when particular acts took place was specifically at issue in *Thompson*. *Id.* at 711-712. No such specificity occurred in this case. In this case, defendant entered pleas admitting to "sexual penetration with [one of the victims] when she was 15 years old" and "sexual contact with [the other victim] when she was 14 years old," when defendant was 15 and they were residing in the same home. In general, time and date are not elements of, or even material to, a criminal sexual conduct offense, especially if the victim is a child. *People v Dobek*, 274 Mich App 58, 83; 732 NW2d 546 (2007). Much of the discussion in *Thompson* addressing what it means for conduct to "relate to" the sentencing offense is therefore irrelevant to the instant matter, because the pleas were non-specific and were entered without reference to specific events, places, or dates.

Defendant's pleas did not require linking his other conduct directly to particular instances of assault. Therefore, the trial court properly considered evidence regarding defendant's patterns of how he carried out his assaults.

Defendant does not raise any factual challenge to his OV scores beyond whether those OVs could be scored at all. We note, however, that the evidence generally supports findings that defendant pointed firearms at the victims and used a gun or knives on the victims (OV 1 and 2); defendant caused the victims bodily injury requiring medical treatment (OV 3); defendant treated the victims with sadism, torture, excessive brutality, or similarly egregious conduct intended to increase the victims' fear and anxiety (OV 7); defendant asported the victims to a place of greater danger or held them captive (OV 8); and two victims were placed in danger of physical injury or death (OV 9). Defendant's treatment of the victims was depraved and disturbing, notwithstanding his trial counsel's references to him being a "kid." Because the trial court was permitted to base its scores of OVs 1, 2, 3, 7, 8, and 9 on defendant's conduct pertaining to his assaults on the victims, we affirm the trial court's determination of defendant's sentencing guidelines score.

We additionally observe that, even if we agreed with defendant's argument regarding the OV scores, he would only be entitled under the circumstances to remand for the ministerial task of correcting his guidelines score. The trial court imposed a departure sentence in this matter irrespective of defendant's guidelines score, so our review would be for proportionality. *People v Odom*, \_\_\_ Mich App \_\_\_, \_\_\_; \_\_\_ NW2d \_\_\_ (2019) (Docket No. 339027, slip op at p 3). Defendant does not challenge the proportionality of his sentence, and under the circumstances, we would regard any such challenge as incredible. See *id.* ("A sentence is reasonable when it is proportionate to the seriousness of the circumstances surrounding the offense and the offender."). A defendant is generally entitled to a remand for resentencing if the sentencing guidelines were incorrectly scored because it is usually impossible to know what sentence the trial court *would* have imposed if the guidelines *had* been correctly scored. *People v Sours*, 315 Mich App 346, 351; 890 NW2d 401 (2016). Here, the trial court's statements on the record at sentencing leave no doubt that it would have imposed the same departure sentence even if OVs 1, 2, 3, 7, 8, and 9 had all been scored at zero points. We would affirm such a departure sentence as proportionate and adequately justified by the trial court on this record.

### III. JAIL CREDIT

Defendant also argues that the trial court erred by failing to award him credit for time served in a juvenile facility on the charges that resulted in his convictions in this case. We agree.

"Whether a defendant is entitled to credit for time served in jail before sentencing is a question of law that we review de novo." *People v Armisted*, 295 Mich App 32, 49; 811 NW2d 47 (2011).

MCL 769.11b states as follows:

Whenever any person is hereafter convicted of any crime within this state and has served any time in jail prior to sentencing because of being denied or unable to furnish bond for the offense of which he is convicted, the trial court in

imposing sentence shall specifically grant credit against the sentence for such time served in jail prior to sentencing.

Additionally, MCL 764.27a(5) provides:

If a person is convicted of a crime within this state and has served time in a juvenile facility before sentencing because of being denied or being unable to furnish bond for the offense of which he or she is convicted, the trial court in imposing sentence shall specifically grant credit against the sentence for time served in a juvenile facility before sentencing.

“The enactment of [MCL 769.11b] reflects the Legislature’s intention to entitle every defendant in a criminal case to the sentence credit described in the statute, instead of leaving the matter to the discretion of sentencing courts.” *People v Prieskorn*, 424 Mich 327, 333; 381 NW2d 646 (1985). Further, under MCL 769.11b, the Legislature sought “to give a criminal defendant a right to credit for any presentence time served ‘for the offense of which he is convicted,’ and not upon any other conviction.” *Prieskorn*, 424 Mich at 341. Moreover, MCL 764.27a(5) explicitly states that a defendant must be granted sentencing credit “for time served in a juvenile facility before sentencing.”

We recognize that the charges to which defendant entered pleas were, technically, newly added and not among the charges originally brought. However, as discussed above, the offenses that formed the basis for those charges were inextricably linked to and substantively part of the entirety of the offenses underlying this matter, whether in juvenile proceedings or in adult proceedings. The Courts do not elevate formalities over substance. *In re Traub Estate*, 354 Mich 263, 278-279; 92 NW2d 480 (1958). It appears that although defendant was released on a tether for much of the pendency of the proceedings, defendant did serve some time in a juvenile facility for essentially the offenses of which he was convicted. Accordingly, the trial court erred by failing to determine, and credit defendant for, the amount of time he served in a juvenile facility for the offenses for which he was sentenced due to “being denied or unable to furnish bond.”

#### IV. CONCLUSION

Defendant’s sentences are affirmed. We reiterate that even if the trial court erred in scoring OV’s 1, 2, 3, 7, 8, and 9, we would nevertheless affirm defendant’s sentences as properly justified and proportionate departure sentences. However, we remand to the trial court for a redetermination of the jail credit to which defendant is entitled, including the time defendant served in a juvenile facility for the offenses underlying his sentences. We do not retain jurisdiction.

/s/ Cynthia Diane Stephens

/s/ Deborah A. Servitto

/s/ Amy Ronayne Krause